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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WENCESLAO CALERA, Defendant and Appellant.	G039456 (Super. Ct. No. 06CF2492) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed in part and reversed in part and remanded for resentencing.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Pamela Ratner Sobeck, and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Wenceslao Calera of second degree robbery, street terrorism, and possession of a firearm by a felon. It also found true he personally used a firearm in committing the robbery. Subsequently, the trial court found true the allegations defendant had five prior strikes, four prior serious felonies, and two prior prison terms. Defendant was sentenced to state prison for a total of 30 years plus 25 years to life. He appeals, contending there was insufficient evidence to support his street terrorism conviction. We agree. Defendant's conviction for street terrorism is reversed and the case remanded for resentencing. In all other respects, the judgment is affirmed.

FACTS

One afternoon, defendant and a young woman entered the computer store where Reid MacDonald was working. After walking around for five to ten minutes, they asked MacDonald about the prices of different products and for a price sheet.

Wearing different clothing, defendant returned alone a few hours later just before the store closed and asked MacDonald to help him with some products. Defendant placed a black duffel bag on the counter, pulled out a gun, and told MacDonald to put computer processors into the bag, stating, "Hurry up, or else, you know, don't make me shoot you." MacDonald placed three or four processors valued at $300-$400 each into the bag and defendant left. MacDonald identified defendant in a photographic lineup.

Gang expert detective John Franks testified that in his opinion defendant was an active participant in the Southside Santa Ana gang (Southside), an active and violent street gang with approximately 100 active members whose primary activities were homicides or attempted homicides, robberies, narcotics sales, and weapons violations. Defendant had admitted to Franks near the time of the robbery to being a member of the gang since the late 1980's and that his moniker was "Jr." The month after

the robbery, Franks found compact discs belonging to defendant with Southside graffiti and photographs of defendant with active Southside gang members, "throwing hand signs," "showing their tattoos," and wearing clothing with the gang's name. Defendant also had a number of gang-related tattoos on his back and arms.

Franks acknowledged the robbery occurred outside the area claimed by Southside or any other gangs and that during its commission, defendant did not say the word Southside or display his Southside tattoo. There was also no evidence the Southside gang used computers and no computer chips were recovered from any Southside gang member. Additionally, Franks neither saw any graffiti connecting the Southside gang and the robbery, nor heard that anyone including defendant had told the Southside gang about committing the robbery.

In Franks's opinion, the robbery was a gang crime because it was committed by a gang member and involved violence. Participation in violence and intimidation furthers a gang member's respect within the gang and every gang member must "put in work" for his or her gang, which generally means participating in violent crimes and being willing to be imprisoned for the gang.

The parties stipulated that defendant had been convicted of a prior felony for the felon in possession of a firearm count. In support of the street terrorism count, certified records of convictions of two Southside gang members for street terrorism, carjacking, and possession of a controlled substance were admitted at trial.

DISCUSSION

Section 186.22, subdivision (a) punishes "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers,

or assists in any felonious criminal conduct by members of that gang . . . ." As the Supreme Court explained, "The substantive offense defined in section 186.22[, subdivision] (a) has three elements. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, . . . 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and . . . the person 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

Defendant challenges only the third element, contending his street terrorism conviction must be reversed because there was insufficient evidence that he aided and abetted a prior separate felony committed by other members of the Southside gang. But in proscribing street terrorism, the Legislature did not intend to punish only persons who demonstrate their active participation in a criminal street gang by aiding and abetting felony offenses, while exempting from punishment the gang members who directly perpetrate an offense. (*People v. Salcido* (2007) 149 Cal.App.4th 356, 367-370; *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436.) Rather, the statute "applies to the perpetrator of felonious gang-related conduct as well as to the aider and abettor." (*People v. Ngoun*, *supra*, 88 Cal.App.4th at p. 436.)

The Attorney General argues "a gang-related nexus finds no support in the language of the statute" and that *People v. Ngoun* "inadvertently suggested a new element . . . ." As he asserts, "Once a defendant is shown to be a member of [a criminal street] gang with primary activities defined by statute, there is no further requirement that the defendant promote those primary activities: rather, furthering, assisting or promoting any criminal conduct will suffice under the express language of the statute." (Italics omitted.) We disagree.

"'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.

[Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]' [Citation.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 491.) "'The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citation.] . . . If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy. [Citation.]" (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1125.) We must "avoid, if possible, interpretations that render a part of a statute surplusage. [Citations.]" (*People v. Cole* (2006) 38 Cal.4th 964, 981.)

Here, the Attorney General interprets the phrase "willfully promotes, furthers, or assists in any felonious conduct by members of that gang" to mean "furthering, assisting or promoting any criminal conduct." But this construction imposes punishment for mere gang membership, contrary to the Act's express intent and in violation of a defendant's constitutional right to freedom of association. It also renders the words "by members of that gang" superfluous, contrary to the established rules of statutory interpretation. Had the Legislature intended to criminalize any felony act by a gang member, it need not have included those words and could have simply said, "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists *in any felonious criminal conduct*, shall be punished . . . ."

In our view, the limitation to "felonious criminal conduct" committed by "members of the gang" means the defendant's conduct must be connected to the gang. This construction harmonizes the entire phrase without doing violence to the language of the statute or rendering portions of it mere surplusage.

Our interpretation is bolstered by the express intent behind the Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.), of which section 186.22, subdivision (a) is a part. Section 186.21 states, "It is not the intent of this chapter to

interfere with the exercise of the constitutionally protected rights of freedom of expression and association" but rather "to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." In short, it was enacted to impose increased punishment for gang-related felonies. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047; see *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467 [section 186.22(a)'s purpose is to "punish[] active gang participation where the defendant promotes or assists in felonious conduct by the gang"]; see also *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 [section 186.22(a) "'applies to the perpetrator of felonious gang-related criminal conduct'"].)

The California Supreme Court has also made it clear the street terrorism prohibition is aimed at "criminal conduct in furtherance of a street gang." (*People v. Castenada* (2000) 23 Cal.4th 743, 752.) The requirement that the criminal conduct be gang related ensures that the street terrorism statute does not unconstitutionally extend to street gang participants whose gang involvement is merely nominal or passive. (*Ibid*.) Thus, although "section 186.22(a) does not require that the crime be for the benefit of the gang" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1334), because its "gravamen is the *participation in the gang itself*" (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1467), defendant must still have the "'objective to promote, further or assist that gang in its felonious conduct . . . .'" (*People v. Ngoun*, *supra*, 88 Cal.App.4th at p. 436.)

Reviewing the record in the light most favorable to the judgment, we agree with defendant the evidence was insufficient to show he had a gang-related objective in committing any prior felony or in robbing the computer store. There was no evidence defendant committed a crime with any of the Southside gang members depicted in photographs with him, that any of his prior felony convictions were gang related, or that he participated in the crimes ascribed by Franks to the Southside gang as its primary activities.

Nor was there any evidence that during the computer store robbery defendant claimed he was a Southside gang member, displayed Southside gang signs or tattoos, spoke Southside gang epithets, wore clothing indicating gang affiliation, or used a Southside gang gun. No evidence connected MacDonald or any other computer store employee or customer, including the unidentified woman who had entered the computer store earlier with defendant, to any gang. The crime was committed outside the territories claimed by the Southside gang or any of its rivals. And there was no evidence that news of the robbery spread to other Southside gang members or the community, thereby increasing his or the gang's stature, or that his gang received the stolen computer processors or otherwise benefited from the robbery.

Franks did testify the computer store robbery was gang crime because it was committed by a gang member and involved violence. Generally the "testimony of a single witness is sufficient to support a conviction" (*People v. Young* (2005) 34 Cal.4th 1149, 1181), and "expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. [Citation.]" (*People v. Ferraez*, *supra*, 112 Cal.App.4th at p. 930.) But a gang expert's testimony alone is insufficient to prove an offense is gang related (*id*. at p. 931) and unlike *People v. Ferraez* and other cases finding similar testimony sufficient, Frank's testimony was not "coupled with other evidence from which the jury could reasonably infer the crime was gang related." (*Ibid.*) Although there was evidence defendant was an active participant in the Southside gang, mere membership in a gang is insufficient to establish a crime is gang related. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623.) Without some evidence to connect the computer store robbery to the Southside gang, Franks's testimony was insufficient to sustain a conviction for street terrorism. Rather, it was an improper opinion on the ultimate issue that "did nothing more than inform the jury how [he] believed the case should be decided." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.) Simply put, the record shows only that this

was a robbery committed by a person who happened to be a gang member, not that a gang member committed the robbery to promote his gang.

DISPOSITION

The judgment of conviction on count 2 for street terrorism is reversed for insufficiency of the evidence. The case is remanded for resentencing. In all other respects, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.